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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: MAY 12 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion and will affirm the previous denial of the director and the dismissal of the appeal. The petition will remain denied.

The petitioner is a software development firm. It sought to employ the beneficiary permanently in the United States as a computer systems analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The director denied the petition on September 17, 2008 and reaffirmed this denial on December 17, 2008 following the petitioner's motion to reopen and reconsider, concluding that the petitioner had failed to establish that the beneficiary satisfied that the minimum level of education required by the terms of the ETA Form 9089. On January 21, 2010, the AAO dismissed the appeal[1] and affirmed the director's denial, determining that the petitioner had failed to demonstrate that the beneficiary qualified for a visa as an advanced degree professional.[2]

On February 22, 2010, the petitioner, through counsel, filed a motion styled as a motion to reopen and reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits new evidence related to the beneficiary's credential from the Indian Institute of Electronics and Telecommunications Engineers (IETE). Because this motion is submitted with new evidence that is consistent with the regulation, it will also be considered as a motion to reopen in accordance with 8 C.F.R. § 103.5(a)(2).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the

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[1] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[2] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree."[3] *Id.*

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the priority date established by the approved labor certification is November 21, 2005.

Part H, Item 4, requires that the applicant have a Master's degree in the field of study of Computer Science and 24 months in the job offered as a computer systems analyst. Part H, Item 7 indicates the acceptable alternative field of study as information systems or an equivalent field of study. Part H, Item 8 allows for an alternate combination of education and experience of a bachelor's degree and five years of experience in the job offered. The beneficiary in the instant matter has a three-year diploma in electronics and communications engineering from SV Government Polytechnic Tirupati,[4] and obtained a 1998 Associate Membership in the IETE.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO dismissed the appeal finding that the beneficiary's Associate Membership in IETE may be comparable to a U.S. bachelor's degree, but the petitioner failed to establish that for the purpose of obtaining an employment based visa as an *advanced degree professional,* it is not a "foreign equivalent degree" as required by 8 C.F.R. § 204.5(k)(2).

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[3]Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." In this case, the petitioner has not asserted that the beneficiary falls within this category.

[4]This Indian diploma states that the beneficiary obtained eligibility for the diploma on February 28, 1990 but the date signified by the seal of the State Board of Technical Education and Training for diploma issuance appears to be April 10, 1997.

On motion, counsel reiterates the assertions submitted on appeal. He contends that the beneficiary's Associate Membership in IETE may be considered, standing alone, as a bachelor's degree and that with the minimum additional five years of experience may satisfy the requirements of a master's degree necessary for an advanced degree professional visa.[5] Counsel asserts that the American Association of Collegiate Registrars and Admissions Officer (AACRAO) supports this position. He further provides a copy of an unsigned credentials evaluation stated to be from AACRAO, Office of International Education Services, Credentials Analysis Service dated April 20, 2009, in which the equivalency of the beneficiary's post-secondary education culminating with his Associate Membership in IETE is deemed to be "comparable to a U.S. bachelor's degree in Engineering." Counsel additionally provides copies of several letters from various Indian colleges or universities that discuss their recognition of an associate membership in IETE as comparable to a bachelor's degree.

It is noted that the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

The AAO does not dispute that the Electronic Database for Global Education (EDGE) created by AACRAO,[6] advises admissions officers that an associate membership in the IETE represents

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[5] Counsel cites to several non-precedent AAO decisions, and asserts that the AAO has considered similar education favorably in other cases. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In the cases submitted, the petitioner had filed under the professional or skilled worker categories. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. The AAO considered the petition under the skilled worker category based on the petitioner's stated requirements and the petitioner's demonstrated intent through its recruitment. However, the cases addressed that the beneficiaries did not have a baccalaureate from a college or university and would not qualify as a professional. Here, based on the EB2 category, where the individual is required to have a baccalaureate degree, which the beneficiary does not have, the petition may not be approved.

[6] According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent

attainment of a level of education comparable to a bachelor's degree in the United States. EDGE further explains, however, that:

> Associate Membership in 1) The Institution of Engineers, India (IEI), 2) Institution of Electronics and Telecommunications Engineers (IETE, formerly AMIETE), or 3) the Institution of Mechanical Engineers, India (IMEI) Part A and B is awarded upon completion of Section "A" examination basic commonalities and Section B examination consisting of compulsory, advanced commonality, discipline commonalities and specialization options courses in various Engineering Divisions (Aerospace, Agricultural, Architectural, Chemical, Civil, Computer, Electrical, Electronics and Telecommunications, Environmental, Marine, Mechanical, Metallurgical and Materials, Mining, Production and Textile Engineering) following the higher secondary certificate and engaged in engineering or industrial profession at least for a period of five years.[7]

The AAO has also consulted AACRAO publications such as *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Placement of Students in Educational Institutions in the United States* (1997). The 1986 *P.I.E.R. Workshop Report on South Asia* indicates that an associate membership in the Institution of Electronics and Telecommunications Engineers (IETE) is based upon sequential examinations, prepatory courses and employment experience. An associate membership is awarded to students who have passed Section A and B of the Graduateship Examination and who have the requisite employment experience. *Id.* at p. 55. The P.I.E.R. World Education Series also indicates that an associate membership in the IETE while not designated as a bachelor's degree would be conditionally considered for U.S. graduate admission in a closely related field if the specialized nature of the program followed is appropriate preparation for graduate admission. *Id.* at p.47. It further indicates that for the associate membership, an applicant must have at least "2 years of practical training /experience in the field of Electronics and Telecommunication Engineering of the standard of the second year of a recognized B.E./B.Tech degree program expected before appearing for Section A of this examination; an additional 2 years of the standard of the final year of such a degree program expected before appearing for Section B." *Id.* at p.112.

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approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/ register/ EDGE is "a web-based resource for the evaluation of foreign educational credentials." In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

[7] Accessed August 2, 2010.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, however, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history. . .indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions."

> Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees the Service will recognized foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*
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> 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaurate *degree.*

Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, certificates, diplomas, or professional credentials, as is the case here, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree," notwithstanding. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

This is not inconsistent with the EDGE determination, which concludes that the associate membership is "comparable" to a bachelor's degree but is not specifically a foreign equivalent baccalaurate degree within the context of the second preference visa category as the credential is based on examinations plus experience. AS EDGE and the AACRAO publications outline, Associate Membership is conferred after taking examinations and completing a required number of years of relevant experience and, therefore, is the "equivalent" of a bachelor's degree, not the required "foreign equivalent degree." The credential is not based solely on a four-year degree program of study resulting in a bachelor's degree, but instead is a separate credential issued by an institution, distinct from a four-year bachelor's degree. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree "followed by at least five years of progressive experience in the specialty." 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may, in some circumstances, qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. *See* 56 Fed. Reg. at 60900. As noted in the AAO's previous decision, while IETE may offer courses and examinations, IETE will not standing alone, be considered as a degree granting institution. *See Snapnames.com, Inc. v. Michael Chertoff,* 2006 WL 3491005*11 (D. Ore.Nov. 30, 2006)(finding USCIS justified in concluding that membership in the Institute of Chartered Accountants of India was not a college or university "degree" for purposes of classification as a member of the professions holding an advanced degree).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent *degree*." (Emphasis added.) For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C)[8] requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent *degree*." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

While the IETE may offer courses and examinations, there is no evidence that the IETE is a college or university or that an associate membership, which is based on a combination of practical experience and examinations, is a "baccalaureate degree," which would allow the beneficiary to qualify as an advanced degree professional.

It may not be concluded that the petitioner has established that this beneficiary possesses the advanced degree in the requisite field of study as required by the ETA Form 9089 or qualifies for visa classification as an advanced degree professional under section 203(b)(2) of the Act. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reconsider and to reopen is granted. The prior decision of the AAO, dated January 21, 2010, is affirmed. The petition remains denied.

[8] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.